du jour were the true majority beneficial parties-in-interest of NMTV; or

(e) allowing Trinity to honestly claim that Mr. Crouch -- who was the minority directors' sole source of funds and the founder and leader of the Trinity international network of religious television stations of which they were a part -- was merely a one-third non-controlling party-in-interest of NMTV.

B.
The minority incentive in the multiple ownership rules
(motion at 30-44)

83. The multiple ownership rule change to allow two extra full power television stations for minority-controlled licensees didn't give an honest and truthful party any reason to believe that the Trinity-NMTV scheme complied with that law either.

84. As the motion concedes at 33-35, Congressional pressure prompting the adoption of this rule change came from the same loins as Congressional passage of the minority-preference lottery legislation for television translators and low power television station licenses. The language used in the lottery legislation, requiring more than 50% minority ownership, was used in bills introduced in Congress and adopted by the Commission. In the lottery legislation, Congress was emphatic about its intention that "real and substantial" advances be made in participation in broadcasting by minorities and its concern that minorities must be the "real parties-in-interest" who participate in the preference program. While the multiple ownership bills did not reach the point of enactment by Congress, the introduction of the

bills followed from the lottery legislation and the use of identical language in the bills and by the Commission reflect the continuing Congressional and agency purpose that a meaningful minority incentive program be established where minorities are the true beneficiaries of the program.

85. In line with its long-standing efforts to encourage financing of minority-owned broadcast ventures, the Commission relaxed its traditional multiple ownership attribution rule (against a financier holding corporate office or a position on the board of directors lest that be counted as a "cognizable" interest) and allowed financiers to do this in order to protect their investments in minority broadcasters. Nothing more. In adopting the relaxed rule, the Commission did not use any words to abrogate the de facto control laws dating back to 1927 -- even if it had the power to do so without legislation by Congress. Multiple Ownership (12-12-12 Reconsideration), 100 FCC2d 74, 57 RR2d 966, 981-982 (¶¶45-46). To the contrary, in the very multiple ownership rule in which this change was made, the Commission retained without change the provision, dating back at least to 1953, that the word "control" includes "actual working control in whatever manner exercised."

86. Thereafter, in a notice of proposed rule making, the Commission described its relaxation of the rule in the following terms:

> ...the relaxed numerical and audience reach caps of the "minority incentive" rules are available to a person investing in minority-controlled enterprises even if he or she is also a corporate officer or director. Therefore,

> relative to use of the "single majority stockholder" rule, an investment in a minority-controlled company may be attractive to persons occupying -- or desiring to retain the option to occupy -- cognizable corporate positions. This aspect of the "minority incentive" provisions may constitute a substantial advantage over the "single majority stockholder" approach in the view of significant investors because it affords them a means short of majority stock control by which to ensure the continued viability of their investment. [emphasis supplied]

Reexamination of the "Single Majority Stockholder" and "Minority Incentive" Provisions of Section 73.3555 of the Commission's Rules and Regulations, 50 Fed. Reg. 27629 (¶7) (1985).

87. Contrary to the argument in the motion at 40-44, (a) the Congressional setting, (b) the absence of any indication of intention to abrogate the de facto control laws dating back some 75 years, (c) the absence of any indication of intention to modify Note 1 of the multiple ownership rules dating back more than 40 years, and (d) this choice of language explaining why investors might hold positions in a company in which minorities had majority stock control, all make clear that the traditional attribution rules for officers and directors did not thereby inferentially operate to eliminate the de facto control laws (a radical change for which Congressional amendment of Section 310 could well be required), which the Commission clearly refrained from doing.

C.
Metromedia, Fox and Speer decisions

88. There is no resemblance here to Metromedia, Inc., 98 FCC2d 300, 55 RR2d 1278 (1984), Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995), amended capitalization approved, 11 FCC Rcd

5714 (1995), recon. denied, 11 FCC Rcd 7773 (1996), appeal pending sub nom. Metropolitan Council of NAACP Branches v. FCC, D.C. Cir., consolidated cases 95-1424 and 96-1254, and Roy M. Speer, 3 CR 363 (1996), cited in the motion at 42, 50-54.

89. In Metromedia, Mr. Kluge, over 30 years, accrued to a position of de facto control over his own birthright, as candidly reflected in numerous filings with the Commission throughout that period of time, 55 RR2d at 1281 (¶4). Mr. Crouch accrued to a position of de facto control over someone else's birthright, by manipulation of the minority preference system, while deceiving the Commission in the process.

90. In Fox, Mr. Murdoch accrued to a position of de jure and de facto control over his own birthright. When alien control and misrepresentation questions arose regarding financing from an Australian company in which Mr. Murdoch was a principal if not the controlling party, the Commission conducted a fact-finding evidentiary investigation which included extensive document production and deposition testimony by 17 representives of Mr. Murdoch's interests and 12 Commission staff members in which the adverse petitioning party had certain participation rights. On the facts of the case thus determined, the Commission held that there was no alien control (subject to restructuring the financial arrangement to comply with the alien ownership provisions of Section 310(b) of the Act) and there was no lack of candor or misrepresentation to the Commission. Here, a more formal hearing has been held and on the facts thus determined,

Judge Chachkin has held that Mr. Crouch and Trinity are guilty both of pervasive de facto control violations and deception of the Commission regarding those violations.

91. In Speer, a television permittee, who was a minority, entered into a nonvoting stock arrangement with a financier for construction of his television station. During the construction period, the financier assumed undue control of the process and the permittee abdicated his control responsibilities. However, at the end of that period and when the station commenced operations, the permittee resumed proper control of the station. There was no effort to hide the facts and circumstances, as the parties were in public litigation with each other and made references to that in pleadings filed with the Commission. For the breach of the de facto control laws during the construction period, which was ended by the parties without any need for Commission intervention, a fine was assessed. On the facts of the case, no misrepresentation was found. Here, Trinity has been adjudicated guilty of deception, it continued a course of unlawful de facto control for many years with respect to television translator stations and full power television stations, and that misconduct was brought to light only because of the intervention of outside parties who petitioned the Commission and thus blew the whistle on Trinity and Mr. Crouch.

D.
Legal legerdemain (slight of hand)

92. The motion at 49-50 says that Note 1 of the multiple ownership rule does not apply to the minority ownership incentive

under the rule because the provisions have two different purposes, i.e., the purpose of Note 1 being to control limits on station ownership, the purpose of the incentive being to foster minority ownership. For more than 40 years the national television station limit has been subject to Note 1. Whether the station limit was five, seven or twelve, if a group owner had de facto control of a 6th, 8th or 13th station, the station counted against it under the rule. So too after the rule was amended to provide for the minority incentive. After that amendment, if a non-minority group owner assumed de facto control of a 13th or 14th station from another non-minority station owner, the national limit was exceeded. Likewise, after that amendment, if a non-minority owner assumed de facto control of a 13th or 14th station from a minority party, the national limited was exceeded. Either way, Note 1 applied to determine the total station count and served the same purpose it always has. At the same time, Note 1 also serves to effectuate the minority incentive in a real and meaningful way as well, guarding against sham manipulations by non-minorities.

93. The motion at 38 says that Commissioner Patrick's dissenting view of the minority incentive (as an exception to the de facto control laws) must be accepted as correct agency law because the majority opinion did not take issue with his dissenting opinion. This is not correct, to say the least. Unresponded-to dissenting opinions have no weight if the state of the law can be determined definitively; if not, unresponded-to

dissenting opinions carry limited weight in the same genre as dicta, treatises and other such matters from which broad policies and trends may be discerned. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 903-909 (1st Cir. 1988) (en banc), cert. denied, 488 US. 1043 (1989); Losacco v. F. D. Rich Construction Co., Inc., 992 F.2d 382, 385 (1st Cir. 1993).[3]

94. Here, the definitive state of the law or, alternatively, the discerned policies and trends, are contrary to Commissioner Patrick's dissent. The indicia of the definitive state of the law or discerned policies and trends, inconsistent with Commissioner Patrick's dissent, are these: (a) the intent of Congress and the Commission to achieve real and meaningful participation by minorities, (b) Section 310 and the 75-year consistent application of de facto control laws to broadcast station ownership, (c) the more than 40-year history of Note 1 implementing the de facto control laws in the very multiple ownership rule in question, and (d) the further notice of proposed rulemaking by the Commission making clear that investors in minority-controlled stations were allowed to hold corporate office and a position on the board of directors in order to protect their investments.[4]

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[3] Decisions by federal courts applying state law.

[4] Schedule of Fees, 50 FCC2d 906, 32 RR2d 619 (1975) involved the Commission's understanding of the Supreme Court's reversal and remand of its fee schedule, a case of first impression under the then relatively new fee provisions of the Communications Act for which there was no other source of the state of the law.

95. The motion at 39, quoting from comments in the rulemaking proceeding, cites the Washington Post and Covington & Burling in support of its argument that a minority exception to the de facto control laws was established. Parties can say anything they want in comments filed in FCC rulemaking proceedings, driven by whatever private agendas they may have, obvious or otherwise, and their lawyers are obligated to carry out their wishes within the bounds of legal ethics. In point of fact, the entire passage read in context is not as definitive as portrayed. The comments were comparing advantages and disadvantages of the so-called "single majority stockholder" rule vis-a-vis the minority incentive rule and indicated that the control allowed by holding corporate office and a directorship in the latter was an advantage over the former which did not allow this. That is not the same thing as saying that the de facto control laws do not apply to the minority incentive rule.

96. Our search of the docket files in Suitland has yielded three other comments filed in the same matter. None equates the minority incentive rule as an exemption from the de facto control laws or anything like it. Joint comments filed by The Black Citizens for a Fair Media, National Association for Better Broadcasting and Telecommunications Research and Action Center correlate the minority incentive rule and the single majority stockholder rule quite closely, stating that investors under the single majority stockholder rule can appoint a designee to serve on the board of directors and can otherwise influence company

business to protect their investments (comments attached as Exhibit 4). The National Association of Broadcasters supported continuation of both rules as meritorious (Exhibit 5). The American Legal Foundation opposed continuation of the minority incentive rule on grounds of principle similar to those espoused by Chairman Fowler (Exhibit 6). The rulemaking has been terminated without prejudice (Exhibit 7).

97. The motion at 48 says that since the multiple ownership rule amendment provides, "Minority-controlled means more than 50% owned by one or more members of a minority group," the use of the word "means" excludes anything not stated. The motion concludes that this, thusly, excludes Note 1. Well not quite. The definition to which the motion refers is found in subpart (e)(3)(iii) of the multiple ownership rule, 47 C.F.R. §73.3555(e)(3)(iii). The entire multiple ownership rule, including that subpart, is the subject of four Notes, numbered 1, 2, 3 and 6 (other variously-identified subparts of the rule are also subject to provisions specified in Notes 4, 5, 7, 8, 9 and 10). Accordingly, the definition referred to in the motion cannot be read in its entirety without also reading Note 1 which brings into play working control in whatever manner exercised as well as majority stock ownership.

98. The motion at 45-46 quotes and cites to the decision of the Supreme Court in Metro Broadcasting, Inc., 497 U.S. 547 (1990) and the brief in that case filed by the Commission, both to the effect that minority ownership per se is enough in order

to achieve program diversity. One has to wonder what decision and brief Trinity is reading.

99. We start with the brief which, according to the motion at 46, "expressly recognized" that Congress determined that mere ownership would achieve such diversity, citing pages 13 and 19 of the brief appended as tab 13. Perhaps our bifocals need checking, but we have looked at pages 13 and 19 of the printed brief, pages 13 and 19 of the reproduction of the printed brief in the tab, and, for that matter, the entire brief, and cannot find the "express recognition" to which the motion refers. We did find the following passage in the Commission's brief:

> Testimony in congressional hearings concerning minority participation in the broadcasting industry has echoed the same themes.
>
> > [T]he importance of minority ownership is clear. Minorities need to have a voice that speaks to them, for them and about them. Black owned radio and television stations are not afraid to push voter registration. Black owned broadcast stations are not afraid to talk about South Africa. In particular, black owned radio stations give black politicians a chance to be heard. Black people listen to black radio. Because black radio stations still subscribe to the concept of operating in the public interest. Black radio is local. It's the church program on Sunday, it's the community school, it's the forum for issues that many non-minority owned radio owners would consider too "sensitive," too "one issue oriented" or "not sexy enough."
>
> Hearings on H.R. 5373 at 164-165 (statement of Jesse L. Jackson).

Pages 37-38 of the printed brief, pages 26-27 of tab 13.

100. Perhaps the Supreme Court didn't see the reference in the Commission's brief (to mere minority ownership being enough) either. The majority opinion of the Court stated:

> The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.

547 U.S. at 579. Also,

> Although all station owners are guided to some extent by market demand in their programming decisions, Congress and the Commission have determined that there may be important differences between broadcasting practices of minority owners and those of their nonminority counterparts.

547 U.S. at 580. Also,

> Evidence suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news," inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. [footnotes citing sources omitted]

497 U.S. at 580-582. And,

> While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.

497 U.S. at 582.

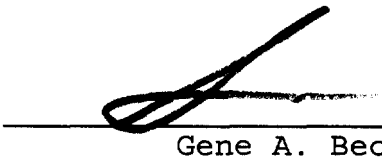
101. The Supreme Court, like the Congress and the Commission, recognized the clear concept at work in the minority programs relative to broadcasting as licensed by this agency, which is not some sanitized, pristine notion of naked legal titles to stock certificates and naked titles as members of the board of directors of nonstock corporations, but rather the notion of fundamental, substantive beneficial ownership of stock and legitimate roles in the governance of nonstock corporations, in true entrepreneurial and policymaking positions, thus effecting meaningful ownership and control by minorities.

X.
Conclusion

102. For the foregoing reasons, the motion should be denied or dismissed. It rests on two items of evidence, heralded as "dramatic new information," which are 11 and 9 years old, were available for presentation at the hearing, are now raised without a shred of good cause, in one instance relying on statements made in Commission meetings contrary to FCC rules against such use of those statements, and in both instances adding nothing of substance to the record. The motion is a rehash of arguments that were made on four previous occasions and are contrary to 75 years of experience under Section 310 and three decades of agency programs seeking to afford real and meaningful broadcast opportunities for minorities. The motion, without justification, is an intrusion on the proceeding at the eleventh hour when the matter is pending before the Commission for final agency

decision.

Respectfully submitted,



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October 25, 1996

EXHIBIT 1

SEPARATE STATEMENT OF CHAIRMAN MARK S. FOWLER

I applaud the effort of Congress to empower the Commission to employ a lottery to alleviate the Commission's processing and adjudication burdens and the accompanying delay that selecting among many competing applicants for broadcast or other licenses engenders. A lottery method of selection can assist in the inauguration of new telecommunications services that might otherwise be subject to interminable delay. I would have desired, however, that the lottery system authorized by Congress have offered all qualified license applicants an equal opportunity for success. A nondiscriminatory lottery is not only vastly easier to administer than the skewed lottery architected by Congress, but also reflects a paramount aspiration of this Nation: equal justice or opportunity for all persons under the law. I unequivocally oppose relying on the color of a person's skin to determine whether special preferences should be awarded in seeking communications licenses through a lottery system. The tragic history of race relations in the United States naturally elicits enormous sympathy for those who in the past have suffered grievously on account of race. But this sympathy should not blind us to the constitutional questions raised by the minority preference system and to the unhappy policy implications of enshrining racial preferences into law.

The decisions in University of California Regents v. Bakke 1/ and Fullilove v. Klutznick 2/ established standards by which to test the constitutional validity of a lottery that prefers minority applicants. First, findings must have been made that discrimination existed in a particular industry. Second, a remedial program must be narrowly tailored to remedy the effects of that past discrimination without excluding other innocent groups from the opportunity to participate in the relevant field. Third, the program must be subject to continuing oversight to assure that it will cause the least possible harm to innocent third parties.

Bakke established the proposition that preferences for minorities may be used only where there have been "judicial, legislative, or administrative findings" of specific instances of discrimination in the field in issue. 3/ "Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another," 4/ for there could be no showing of a compelling justification for inflicting competitive disadvantages on innocent individuals.

In Fullilove, the Court approved a preferential program for public works contracting but only because Congress had made findings on the basis of "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities. . . ." 5/ The absence of any similar findings with respect to the broadcast industry is arguably fatal to the Commission's preferential program. It is clear from the Bakke decision that evidence of past discrimination in society at large is insufficient to justify the imposition of an affirmative action program. 6/

There have been no Congressional findings of illegal discrimination in the communications field. In the Conference Report accompanying the Communications Amendments Act of 1982, the Conference Committee made findings that minority groups were "significantly underrepresented in the ownership of telecommunications facilities." 7/ Congress, however, omitted any findings that attributed this underrepresentation to illegal discrimination by either governmental or private parties. Underrepresentation in an industry or profession, simpliciter, cannot justify racial preferences. See Bakke at p. 302.

1/ 438 US 265 (1978).

2/ 448 US 448 (1980).

3/ Bakke, supra, at p. 307.

4/ Ibid., at p. 309.

5/ Fullilove, supra, at p. 477.

6/ Ibid., at p. 307.

7/ H. Rep. No. 97-765, 97th Cong. 2nd Sess. (1982) ("Conference Report") at p. 45.

Even if there had been findings that illegal discrimination in the communications industry had handicapped some minorities in competing for broadcast licenses, the remedy created by Congress would still be of questionable legitimacy. Central to the Court's holding in Fullilove was the doctrine that the preference accorded to minorities must be equivalent to the extent of the past discrimination. Congress, however, has awarded minorities a 2 to 1 lottery preference without findings that this degree of preference accurately reflects the amount of the handicap that might be attributed to putative past discrimination. The preferences awarded extend to all minority applicants, whether or not the applicant has substantial resources or enjoyed the same or better educational or other opportunities compared to a non-preferred applicant.

An affirmative action remedy must be tailored to correspond to the extent of injury traceable to past illegal discrimination, and must be subject to continuing oversight to ensure that it will do the least possible harm to innocent persons disadvantaged thereby. 8/ The statute upheld in Fullilove, for example, set a goal of devoting 10% of each public works grant to minority businesses, but provided that bids from minorities above ordinary competitive levels need only be entertained to the extent they reflect "costs inflated by the present effects of prior disadvantage and discrimination." 9/ With regard to the "continuing oversight requirements," the Communictions Amendments Act of 1982 is silent. 10/ The program challenged in Fullilove was a one-time program, and there was consequently no need for continuing oversight. The lottery preferences, in contrast, can be employed indefinitely, and some type of meaningful oversight would seem to be required to justify a racial classification.

Because the preferential program adopted today impinges on the civil rights of innocent individuals on account of race, I believe it to be constitutionally unsound. I believe that whenever the courts, Congress, or this Commission diverge from a norm of color-blindness, there must be a compelling reason, for, as Justice Stevens has noted, "classifications based on race are potentially so harmful to the entire body politic." 11/ No compelling reason animated Congress to etch racial preferences into the lottery system. 12/ Too often in our history, policymakers and the courts have caused adverse social repercussions by making ill-advised decisions in matters of race. 13/ Indeed, as Justice Stevens further observed, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." 14/

The victims of the minority preference system are innocent non-preferred persons who are denied equal opportunity to compete for a Commission license. It seems to me that history has demonstrated that when race, class or caste are officially sanctioned as reasons for denying equal opportunity, then a principle has been established that threatens to deny equal opportunity for everyone. As Justice Jackson so eloquently put it in Korematsu v. U.S., 15/ the principle lies around like a loaded weapon ready to be used by persons who claim an urgent need.

To diverge from a norm of color blindness is to foster racial antagonism 16/ and to denigrate individual liberty. While some commentors have suggested that to get beyond racism, the

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8/ Bakke, supra, at pp. 308-309.

9/ Fullilove, supra, at p. 481.

10/ A statement in the Conference Report directs the Commission to furnish annual reports on the effect of Section 309(i)(3) (Conference Report at p. 45). The minority preferences, however, do not terminate even if underrepresentation by minorities in broadcasting is overcome.

11/ Fullilove, supra, at p. 534 (Stevens, J. dissent).

12/ Congress seemingly assumed that diversity of broadcast programming would be advanced by increasing broadcast ownership by minorities. There is not a scintilla of evidence based on experience or otherwise to support this assumption.

13/ See Dred Scott v. Sandford, 60 US (19 How) 393 (1857); the Civil Rights Cases, 109 US 3 (1883); Plessy v. Ferguson, 163 US 537 (1896).

14/ Fullilove, supra, at p. 534 n. 4 (Stevens, J. dissent).

15/ 323 US 214, 246 (1944) (Jackson, J. dissent).

16/ Anderson v. Martin, 375 US 399 (1964).

country must employ racist means, 17/ I believe that viewpoint is utterly irreconcilable with American ideals of equal civil rights. Four score and seven years ago, Justice Harlan urged a constitutional norm of color-blindness that history has applauded: "In respect to civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved." 18/ Events at home and abroad since Justice Harlan delivered his memorable words substantiate their ageless wisdom.

I wish to make it clear that these views should not be interpreted as a weakening of my commitment to increasing the participation of minorities in broadcasting through nondiscriminatory means. 19/

I also disagree with another aspect of the lottery order: namely, the Commission's determination to bar newspapers from eligibility for a diversity preference. The statutory provision relating to lotteries requires that certain preferences be accorded when a lottery is used to grant licenses for any medium of mass communication. One of the preferences to be awarded is a diversity preference, meant to encourage divergent sources of programming and information. The preference applies to applicants who control less than four other media of mass communications. The statute provides that the "term 'media of mass communication' includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted towards providing programming. . . ." 20/ Because newspapers are not licensed, it is clear that the Congress did not intend that they be deemed a medium of mass communications. In addition, the other media listed differ in type from newspapers in that they utilize the electromagnetic spectrum.

My fellow commissioners rely on language in the Conference Report 21/ to support their view that newspapers are to be included within the definition of mass media. The fact that the Conference Report mentions newspapers when the statute is silent with respect to them argues in favor of a contrary conclusion, for it makes clear that consideration went into the question of whether newspapers should be included within the definition of mass media, and that Congress did not vote affirmatively in favor of inclusion. The use of a Conference Report to supersede the meaning of an unambiguous statute is inappropriate, 22/ for it is a fundamental canon in matters of statutory construction that "legislative purpose is expressed by the ordinary meaning of the words used." 23/

As a matter of policy, I also believe it to be unsound to prevent newspapers from obtaining a diversity preference in obtaining an LPTV license. Newspapers can be an invaluable source of equity capital and management talent, as was demonstrated in the early history of radio and television stations, where newspapers played a substantial role in underwriting local television stations. It is also in the national interest to allow newspapers to diversify their financial investments. Congress acknowledged the importance of preserving newspapers as viable means of communication in the Newspaper Preservation Act 24/ and to prejudice their ability to

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17/ Bakke, supra, at p. 407 (Blackmun, J. dissent).

18/ Plessy v. Ferguson, 163 US 537, 554 (Harlan, J. dissent) (1896).

19/ I also believe it is my duty to administer faithfully the lottery statute enacted by Congress despite my doubts as to its constitutionality.

20/ 47 USC §309(i)(3)(C)(i) (emphasis supplied).

21/ Conference Report at 41.

22/ Caminetti v. U.S., 242 US 470, 490 (1917).

23/ Richards v. U.S., 369 US 1, 9 (1962). The Representatives and Senators who voted on the lottery statute were entitled to rely on the text of the statute and not the Conference Report in determining how to vote. Similarly, when the President deliberated as to whether to sign the bill, he could assume that the unambiguous statutory language controlled.

24/ 15 USC §1801.

communicate through the medium of LPTV is antithetical to the motives that spurred the passage of that Act.

The argument advanced in support of the Commission's position — that diversity in mass media will be furthered by the Commission's yoking newspapers within the ambit of mass media — is twice flawed. First, it means that the diversity demerit would be imposed on a newspaper in San Francisco if it applied for an LPTV station in Omaha. Such a combination would clearly not impair diversity, because San Francisco newspapers do not penetrate the Omaha market, and an Omaha LPTV station would not compete in the San Francisco market. Secondly, the diversity of views championed by the First Amendment and public interest considerations has both a quantitative and qualitative aspect. A reasonable number of varying views are required to stimulate edifying political or other discourse. But such discourse will be impoverished without concern for the quality of viewpoints expressed. As Alexander Meiklejohn observed,25/ it is more important that everything worth saying shall be said than that everyone shall speak. To allow newspapers to own LPTV stations would increase the quality and richness of views received by the audience and thereby further diversity concerns. A rigid insistence on maximizing the gross number of different viewpoints at the expense of all other First Amendment values is contrary to the public interest.

CONCURRING STATEMENT OF COMMISSIONER ANNE P. JONES

Since the rules and procedures established by this Report and Order are intended to speed authorization of service and may have that effect, I concur. I do so, however, with substantial reservations of which I will mention only a few.

First, it seems to me these rules and procedures could and should be simpler, shorter, and better designed for their intended purpose. For example, I believe Commissioner Rivera is correct that the preference scheme adopted out of deference to the Conference Report may not in all circumstances result in the "significant preferences" for underrepresented persons and groups mandated by the statute. If experience demonstrates that a different scheme is needed to achieve the statutory purpose, I hope the Commission will adopt it on the premise that the statute and not the Conference Report is the law of the land.

Second, I believe the flood of applications being received in the cellular mobile radio service is demonstrating that the Commission may have erred in excluding that service from this proceeding. If we are to avoid a licensing debacle in cellular comparable to that which already exists in low power television, we should promptly move toward use of the lottery mechanism to choose from among competing qualified cellular applicants.

Third, I am distressed that the Commission did not give serious consideration in this proceeding to the possibility of granting "significant preferences" to women. On this point, I note that the evidence cited by Commissioner Dawson clearly indicates that women are "applicants . . . the grant to which of [a mass media] license or permit would increase the diversification of ownership of the media of mass communications." Hence they should be granted a preference and may well also qualify for the "additional significant preference" which under the statute "shall be granted to any applicant controlled by a member or members of a minority group."

With these reservations and some others, I concur in issuance of this Report and Order in the hope that it will be only the first step in establishment of a fair, efficient, and simple mechanism for speeding authorization of needed telecommunications service by choosing by random from among competing qualified applicants for radio licenses. I look forward to the next step.

CONCURRING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

To the extent preferences have been enacted into law and to the extent those preferences appear to be based on underrepresentation in broadcast ownership, I believe that a preference for female ownership should also be given in cases involving lotteries.

First, it seems clear that the preferences awarded by the lottery statute are based on traditional underrepresentation in broadcast ownership. As the legislative history of the lottery statute says, preferences are awarded because the

25/ Meiklejohn: Political Freedom, 26 (1948), quoted in CBS v. Democratic Nat'l Committee, 412 US 94, 122 (1973).

EXHIBIT 2

DECLARATION OF ALAN E. GLASSER

1. My name is Alan E. Glasser, and I reside at 2822 Plaza Verde, Santa Fe, New Mexico 87505-6512. From February of 1969 until early June of 1994, I was employed as an attorney for the Federal Communications Commission (F.C.C.) in Washington, D.C.

2. In 1987, I was an attorney supervisor in the Television Branch of the Video Services Division of the Mass Media Bureau. My office was located in Room 700 at 1919 M Street, N.W., Washington, D.C. 20554. I recall reviewing an application filed by National Minority T.V., Inc. (NMTV) for authority to acquire a television construction permit to build a station in Odessa, Texas. That application requested that it be processed and considered pursuant to the F.C.C.'s minority ownership rule and policy. The rule and policy allowed multiple licensees to hold an interest in two additional stations. Normally, the limit on ownership by multiple licensees was 12, but an additional two was permitted if those stations were controlled by recognized minorities. NMTV was a nonstock, nonprofit corporation. It had three directors, I recall, two of whom were recognized minorities. I had discussions with Colby May, the attorney representing NMTV, concerning the application.

3. I understand that a hearing was designated at the F.C.C. in April 1993, and was held between November 1993 and May 1994, the issue of which involved whether NMTV lacked candor in the Odessa application. The actual designation involved Trinity Broadcasting of Florida, Inc. and its renewal application for WHFT(TV), Miami, Florida, and involved questions regarding NMTV's proposed acquisition of WTGI(TV), Wilmington, Delaware, where similar issues were raised. The Delaware application was voluntarily dismissed by the applicants prior to the designation of the Florida renewal application. The principals of NMTV and Trinity Broadcasting of Florida, Inc. are very similar. Trinity Broadcasting Network controlled WHFT's licensee, and its principals were similar to those of NMTV. I was employed continuously by the F.C.C. at the office and located as set forth above from the time NMTV's Odessa application was filed until my retirement in June of 1994; this period of time included the noted hearing. No F.C.C. attorney or other F.C.C. employee contacted me in connection with that hearing to ask me about my review of the Odessa application or any of my discussions with Colby May about that application.

4. If I had been asked, I would have stated that I believed then and believe now that Colby May was forthright in his submission of information involving NMTV because, during our many discussions, I was very concerned about the relationships noted above. He was responsive and supplied all information that I had

requested. I went to my superior, Roy Stewart, Chief of the Video Services Division, to express my concerns and to ask if further information was necessary to show compliance with the Commission's minority ownership policy. I was told to obtain NMTV's By Laws and if they were in compliance with the state where executed that would be sufficient. That information was provided by Colby May. So I can say truly that he was responsive. In any event, we did not go behind the By Laws and/or request any further information or explanation. The application as approved by my superiors, not me. I had no authority to approve applications other than short-form applications. Those applications did not involve complete change of ownership of a particular station or stations.

Executed under penalty of perjury in Santa Fe, New Mexico, this 9th day of April, 1996.

Alan E. Glasser

EXHIBIT 3

stations in the same service which are not minority controlled.

(2) No licensee for a commercial TV broadcast station should be granted, transferred or assigned any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or have a cognizable interest in, either:

(i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, and

(ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority controlled.

(3) For purposes of this paragraph:

(iii) 'Minority control' means more than fifty (50) percent owned by one or more members of a minority group.

(iv) 'Minority' means Black, Hispanic, American-Indian, Alaskan Native, Asian and Pacific Islander.

24. I interpreted the Multiple Ownership MO&O and the rule to allow NMTV to acquire the Odessa CP notwithstanding Dr. Crouch's interest in 12 other commercial television stations at the time. In fact, I believed, and so advised Mrs. Duff and Dr. Crouch, that the Commission was expressly encouraging group owners and/or their principals to become involved in minority owned companies, and to provide to such companies as much help as possible in all areas of operations to help ensure success. And precisely for that reason I believed it was appropriate for NMTV to have a program affiliation agreement with TBN (Tab O); for TBN to advance loans

and provide an open line of credit for NMTV; for TBN to provide NMTV with business and accounting services such as accounts payable and payroll processing; for NMTV to use and have access to TBN employees to aid in engineering matters, station and studio construction, and FCC applications; for TBN and its employees to provide technical and engineering advice and operational and maintenance manuals; for NMTV and TBN to share common officers and personnel performing ministerial functions; for NMTV to have similar insurance and benefit plans as those of TBN; and for TBN to generally assist NMTV in succeeding.

25. My advice was buttressed by the comments of Commissioner Patrick in partially dissenting to the Multiple Ownership MO&O. He stated that:

> ... the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity ... (57 Rad. Reg. 2d (P&F) 966, 988).

This confirmed my own understanding of how the Commission intended the Rule of 14 exception to work, namely that: as long as a majority of the directors of a nonprofit/nonstock organization were minorities they would be regarded as the owners in control and would qualify under the rule.

26. NMTV's Odessa construction permit assignment application was filed on February 3, 1987 (BAPCT-870203KF) (see Tab P). To my knowledge this was the first application filed under the Rule of 14 exception to the multiple ownership rules. During the processing

of the assignment application I had a number of communications with the Commission's processing staff regarding the application and the involvement of Dr. Crouch and TBN. During these discussions, which occurred primarily with Mr. Alan Glasser, a staff attorney, I even mentioned that Mrs. Duff was an employee of TBN. My discussions with the staff culminated in an informal request from Mr. Roy Stewart, then Chief of the Video Services Division of the Mass Media Bureau, that NMTV's Articles of Incorporation, Bylaws and organizational minutes be submitted for review. Mr. Stewart told me that he was interested in determining that NMTV's affairs were governed by the majority vote of its directors, and that unanimous votes were not required. I provided the requested documents to Mr. Stewart on April 14, 1987 (Tab Q). The staff then granted the Odessa construction permit assignment application in June, 1987. This further confirmed my belief that NMTV's structure complied with Commission policy.

27. After the Odessa and Portland construction permit assignments were granted, I was again reinforced in my belief that NMTV, and its relationship to TBN, fully qualified for the Rule of 14 minority exception when I read a January 28, 1989 article in the Los Angeles Times (Tab R). The article was entitled *Liberal Reading of FCC Minority Rule has Helped TBN's Growth*, and the author, Mark Pinsky, referred to a conversation with "Alan Glasser, a staff attorney with the FCC" and attributed to Mr. Glasser that the FCC